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In The

Supreme Court of the United States

October Term, 1974

No. 74-145

ADRON P. BRAINERD,

Petitioner,

vs.

WARREN W. REAL and
ROBERT O. DUNN,

Respondents.

RESPONSE OPPOSING CERTIORARI

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Supreme Court of the United States

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No. 74-145

ADRON P. BRAINERD,

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vs.

WARREN W. BEAL and ROBERT O. DUNN,

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QUESTIONS PRESENTED

1. Whether a petitioner may rely in his petition for certiorari on an affidavit never filed with the Court of Appeals, first called to that Court's attention in a petition for rehearing, and submitted to that Court without prior motion or leave of court.

2. Whether an unsworn "affidavit" about "general" practices of the clerk's office in entering judgments of record can impeach the unambiguous certification and docket entry of that same clerk's office as to the date of entry of record of a particular order in a particular case.

REASONS FOR DENYING WRIT

I.

THE KEY AFFIDAVIT ARGUED IN THE PETITION FOR CERTIORARI WAS NOT BEFORE THE COURT OF APPEALS.

As the face of the Petition shows, the Court of Appeals heard oral argument in this case on February 11, 1974 and rendered a decision on May 20, 1974. (Pet., App. p. 4.) The Petition also shows that it was only *after* that argument and decision that petitioner created the affidavit on which he now relies. (Pet., App. p. 3, showing date of May 29, 1974, as date of signature.) Petitioner never sought leave of the Court of Appeals to file that affidavit or to make any argument respecting it. The Court of Appeals never entered any order making the affidavit a part of the record on appeal. All that petitioner did after the May 20 decision was to file a petition for rehearing and attach to it the previously unseen May 29 affidavit. (Pet., App. p. 3.) All that the Court of Appeals did after first seeing the May 29 affidavit was to refuse (without comment) to rehear the case.

The Court of Appeals' discretionary decision not to rehear the case (or to consider the May 29 affidavit) is supported by the settled rule that:

> [Petitions for rehearing] are not for the purpose of presenting matters which should have been but, without good cause, were not argued before . . . and particularly they are not . . . to be used to introduce a record which was not even presented below. (Citations omitted.) (*Local No. 1505* v. *Local Lodge No. 1836*, 304 F.2d 365, 368 (1st Cir. 1962), *cert. granted*, 371 U.S. 908 (1962), *vacated as moot*, 372 U.S. 523 (1963).)

Accord, *Long* v. *District of Columbia*, 469 F.2d 927, 937 (D.C. Cir. 1972) ("It is, of course, within the discretion of

a court to ignore such claims [supporting jurisdiction] if they are not timely made."); *Lummus Company* v. *Commonwealth Oil Refining Co.*, 280 F.2d 915, 932 (1st Cir. 1960) ("If we have erred on the record before us, we would wish to reconsider. But we have no desire to consider a new record at this stage [rehearing]. The affidavits will not be received.").

Under Rule 60(b)(2), F.R.Civ.P., a party seeking to supplement a district court's record after the court has ruled must show that his new evidence "by due diligence could not have been discovered" previously. At least as strict a rule should apply in the Courts of Appeals. There will never be an end to an appeal if the losing party can unilaterally and without leave supplement the record on appeal after an appellate decision has been rendered and thereby force the court to consider the new matter presented. Here it is apparent that the May 29 affidavit could have been submitted before the decision was rendered on May 20. The Court of Appeals did not abuse its discretion in declining to rehear the case.

II.

THE COURT OF APPEALS PROPERLY HELD THAT THE CERTIFIED RECORD COULD NOT BE IMPEACHED BY UNSWORN AFFIDAVIT.

The record before the Seventh Circuit on May 20, 1974, clearly required dismissal of Brainerd's appeal. The clerk had certified that "the documents submitted . . . are the original papers filed and *entered of record* in my office *on the date designated in the List of Documents.*" (Emphasis added.) This official certification and List of Documents, which were before the Court of Appeals and relied on in its opinion, were omitted from the Petition. Accordingly they

are appended hereto as appendix pages A-1 to A-3. Item 41 on said List designates "1-30-73" as the only date associated with the order of dismissal. Likewise, the docket reprinted in part at Pet. 3 lists "1-30-73" as the one and only date relating to the order of dismissal. The dates January 31 and February 1 are nowhere used as dates of entry of record. Item 42 on the List (App. A-3, below) refers to "the order heretofore *entered* on January 30, 1973, dismissing plaintiff's amended complaint." (Emphasis added.)

The unsworn affidavit submitted by Brainerd with his reply brief only indicated that "generally" entry of judgment occurred at the time notices were mailed. (Pet., App. p. 2.) That statement was not inconsistent with the clerk's certification that in this particular case judgment was entered January 30. The "affidavit" nowhere states that this "general" practice was followed in this particular case.

More important, however, it would have been highly unfair for the Court of Appeals to allow the unsworn affidavit of Mr. Cunningham to vary the record. Defendant was not given an opportunity to depose Mr. Cunningham or otherwise undertake discovery concerning practices of the Clerk's office to see what "generally" means. Does it mean that 1%, 5% or 25% of entries are made on the date they purport to be made? Is there some way to determine which entries are made at the time designated? Does someone in the Clerk's office have a specific recollection as to this particular entry? Does Mr. Cunningham have personal knowledge of treatment of this case? Without such inquiries, the Court of Appeals could hardly have resolved a factual dispute even if the affidavit had created such a factual dispute, which it did not since it could have been interpreted as consistent with the certification.

These problems illustrate the unfairness and unworkability of any rule allowing the record on appeal to be varied by one party's affidavit on a disputed matter when the affidavit is first filed on the appellate level. Such problems have caused two Circuit Courts of Appeals to hold that the appellate record cannot be varied by affidavit. *Texas Co.* v. *American Trade Developing Co.*, 272 F. 670, 672 (5th Cir. 1921). *Wall* v. *United States*, 97 F.2d 672, 673 (10th Cir. 1938). At least two state cases applying the same rule have held in a case identical to this that a clerk's affidavit cannot be used to show that an appealable order was entered of record at a time different from that shown in the record. Notice of appeal was held not timely and the appeal was dismissed in both cases, the precise result reached in this case. *Sims* v. *McElhannon*, 113 S.E.2d 437 (Ga. 1960). *Barth* v. *Apache County*, 162 P. 62 (Ariz. 1917). See also *Burkett* v. *Burkett*, 245 S.W.2d 185 (Tenn. 1951).

The reason for the rule is demonstrated by the facts of this case. If the tendered affidavit were admissible, there would be no stability to the appellate record and docket. Every litigant would have to ask the Clerk personally whether "January 30" really meant "January 31," "February 1," or something else. This is obviously not a sensible system and not what is intended by the federal rules. *Danzig* v. *Virgin Isle Hotel, Inc.*, 278 F.2d 580, 582 (3d Cir. 1960) (federal rules contemplate definite date of final judgment appearing on face of record).

It is as fair to require an appellant to comply with the 30-day appeal rule as it is to require compliance with a statute of limitations. Here Brainerd's counsel knew that the judgment was entered January 30 (see his notice of appeal). He knew that the appellate rules required the no-

tice of appeal to be filed within 30 days of January 30. Rule 4(a), F.R.A.P. He knew that late filing of a notice of appeal affected the validity of the appeal. Rule 3(a), F.R.A.P. Thus, petitioner had only himself to blame for the fact that the Court of Appeals did not have jurisdiction of his case. (The Notice of Appeal is p. A-4 of the Appendix hereto.)

Moreover, petitioner has an inescapable dilemma. If no final judgment had been entered here on January 30, 1973, then the Notice of Appeal is insufficient. It only appeals "from the order dismissing the amended complaint *entered* in this action on the 30th day of January, 1973." (Emphasis added.) No attempt was ever made to amend this Notice of Appeal and no Notice of Appeal in the record refers to an order entered after January 30, 1973. Even if petitioner' affidavits were controlling (instead of irrelevant), they would only succeed in showing a different reason why this appeal should have been dismissed.

III.

CERTIORARI IS PARTICULARLY INAPPROPRIATE IN THIS CASE.

A. Mr. Brainerd Has Had His Days In Court.

Although the Court of Appeals dismissed Mr. Brainerd's appeal, he had already been given more than ample opportunity to argue the substantive merits of his case. He first filed the instant allegations in a state court suit in 1968. He litigated the case and lost it. On appeal, he also lost. *Brainerd* v. *First Lake County Nat. Bank, et al.*, 109 Ill. App.2d 251 (1969). He sued again in state court and again lost, this time on *res judicata* grounds. The dismissal of his case was affirmed on the same grounds. *Brainerd* v.

First Lake County Nat. Bank, et al., 1 Ill.App.3d 780 (1970). The opinions point out that, along the way, Mr. Brainerd also lost numerous unorthodox motions, including a "petition for mandamus against all of the judges of the Nineteenth Judicial Circuit." 109 Ill.App.2d at 258.

Having exhausted the state courts, Mr. Brainerd belatedly devised this suit under the federal banking laws. The District Court held that the suit did not state a federal claim and in any event was barred by the statute of limitations. This dismissal for untimeliness led to the instant untimely appeal.

Defendant has had to give Mr. Brainerd many days in court. It is not unfair to put a stop to this matter after three appellate opinions and three trial level dismissals.

B. The Situation In The Northern District Of Illinois Clerk's Office Has Changed.

The question presented by the Petition can have no bearing on any other party if, as petitioner's improper belated affidavit states (Pet. App. 3, ¶¶4-5), the challenged practice of the Clerk's office for the Northern District of Illinois has changed. According to petitioner, the certified List of Documents and docket will in future cases in that District Court use the date "an order is actually entered onto the docket" rather than "the date it was entered by the judge," as was allegedly done in this case. Mr. Brainerd's unique situation is thus unlikely ever to recur. Accordingly, this case does not call for the exercise of the Supreme Court's supervisory powers.

CONCLUSION

WHEREFORE, a writ of certiorari should not issue.

Respectfully submitted.

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Chicago, Illinois 60601
(312) 861-2192

Attorney for Respondents

APPENDIX

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS--SS

I, H. STUART CUNNINGHAM, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify to the United States Court of Appeals, for the Seventh Circuit, that the documents submitted herewith and annexed hereto are the original papers filed and entered of record in my office, on the dates designated in the List of Documents, and together with a true copy of docket entries as they appear in the official dockets in this office, constitute the Complete Record on Appeal in the cause entitled: ADRON BRAINERD vs. WARREN W. BEAL, et al., No. 72 C 1571.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 25th day of April, 1973.

H. STUART CUNNINGHAM, CLERK

By: /s/ Beverly V. Peters
Deputy Clerk

(Appendix)

Item No.

11-30-72—Filed Notice of Motion and motion to file amended complaint 32

11-30-72—Order leave to plaintiff to file instanter amended complaint. Defendants to answer or otherwise plead within 20 days. Order cause reset from December 6, 1972 to January 3, 1973 for report on status—Will, J. 33
Mailed notices 12-1-72 P

11-30-72—Filed Amended Complaint P 34

12-18-72—Filed Motion of Warren W. Beal and Robert O. Dunn to dismiss amended complaint and Exhibits P 35

12-26-72—Filed Brief in support of defendants motion to dismiss amended complaint P .. 36

1-3-73—Order cause continued to January 26, 1973 at 10:00 a.m. for report on status—Will. J. 37
Mailed notices 1-5-73 P

1-5-73—Filed Answer of plaintiff to brief and motion of defendant to dismiss amended complaint P 38

1-9-73—Filed Reply Brief in support of defendants motion to dismiss amended complaint P 39

1-24-73—On Courts own motion order cause reset from January 26, 1973 to January 30, 1973 at 10:00 a.m. for report on status—Will, J. 40
Mailed notices 1-26-73 P

1-30-73—Order defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed (Court's Memorandum opinion will be filed within short date)—Will, J. (JS6) 41
Mailed Notices 2-1-73 gs

2-12-73—Court this day files its memorandum opinion re order heretofore entered on January 30, 1973 dismissing plaintiff's amended complaint.—Will, J. (Draft) 42
Mailed Notices 2-13-73 (with copies of draft) gs

3-2-73—Filed Notice of Appeal by Plaintiff $5.00 pd. 43

4-12-73—Filed affidavit Richard M. Kates, pursuant to General Rule 39 as attorney for Plaintiff. 43A

4-23-73—Filed certified copy of order of USCA entered April 19, 1973. Order Time to file record on appeal extended for 15 days. P .. 44

4-23-73—Filed Request for complete record 45

(Appendix)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ADRON P. BRAINERD,
Plaintiff,

vs.

WARREN W. BEAL et al,
Defendants.

.72 C 1571

NOTICE OF APPEAL

(Filed March 2, 1973)

Notice is hereby given that Adron P. Brainerd, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order dismissing the amended complaint entered in this action on the 30th day of January, 1973.

/s/ Richard M. Kates
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Chicago, Illinois

Attorney for Adron Brainerd